82-5987

PETITION FOR WRIT OF CERTIORARI TO A COURT OF APPEALS

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SUPREME COURT, U.S.

HERBERT LEE RICHARDSON
petitioner

VS.

STATE OF ALABAMA
Respondent

Circuit Court of Houston County.

U.S. SC No._____

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Comes your petitioner, Herbert Lee Richardson, and petitions this Court for a Writ of Certiorari to issue to the Court of Criminal Appeals of Alabama in the above styled cause under Rule 19 (A)(2) and Rule 22, (1), of this Honorable Court, reversing the judgment for the following reasons:

A. This is a second appeall of a death sentense by way of Writ of Error Coram Nobis in the Court of Criminal Appeals of Alabama. The first appeal of this case is officially cited as, Richardson V. State, Ala. Cr. App. 376 So. 2d. 205 (1978) and as Ex Parte; Richardson V. State, Ala. 376 So. 2d. 228, (1979) in the Alabama Supreme Court. The decision now appealed from is unofficially cited as Richardson V. State, Ala., 4th Division, Number 956, Ala. Cr. App., June 29, 1982. All of the above cited decisions and opinions are herein attached.

B. The jurisdiction of this Court is invoked upon the follow-- ing concise statements of the grounds:

(1.) The date of the judgment sought to be reviewed is June 29, 1982, in the Alabama Criminal Court of Appeals, 4th Division, Number 956.

Rehearing to that Court was denied on July 27,1982.

(2.) Petition for Certiorari in the Alabama Supreme Court was filed and denied on October 1,1982,without an opinion. This was a denial by a State Court of last resort in a Criminal case and ;

(3.) As such, is within the statutory provisions believed to confer on this Court jurisdiction to review this judgment pursuant to Rule 22 (1), by Writ of Certiorari and pursuant to Rule 19(1), (A)-(B).

Q. The questions presented for review are as expressed below;

(1). Whether the Alabama Court of Appeals correctly held that the challenge to the warrantless and warranted search of petitioner,s vehicle on constitutional grounds of "the six exceptions to the warrant requirement" on his direct appeal, are the same as a constitutional challenge to the vehicle searches on grounds that"the affiant used false statements knowingly and intentionally, and with reckless dis-- regard for the truth to support probable cause for his two vehicle searches in petitioner's Writ of Error Coram Nobis," ?

(2). Whether the warrantless vehicle search and the warranted search of the same vehicle,later at the police station,can be sustained where it later appears during the direct appeal of the ensuing case , that the averments of the affiant in support of probable cause, affidavit or otherwise, has been traversed by trial testimony of the same state witnesses relied on to support probable cause?

(3). Whether the warranted search of petitioner's home can be sustained where the vehicle search led to the house search and inforderived thereof, was used to support probable cause for the house search in that warrant affidavit?

(4). Whether the warranted search of petitioner's home can be sustained where the officer supplying information formulating probable cause for the search, had deliberately perjured himself in a

prior unrelated search warrant affidavit, can now be considered a "reliable person" for purposes of supplying information supporting probable cause for the search of petitioner's home and where there is evidence within that warrant affidavit itself, of his continued deliberate falsehoods ?

(5). Whether the prosecutor's involvement in the warrant procedures raises to constitutional magnitude in violation of petitioner's right to counsel in this case where the prosecutor participated in preparing affidavits used to secure search warrants, participated in petitioner's arrest without a warrant, participated in the investigation at the crime scene and therefore, marking the commencement of " a criminal prosecution ?."

(6). Whether the appellate court constitutionally upheld petitioner's sentense of death by holding that there was no evidence of a lesser included offense presented at his original trial that would have supported a lesser offense conviction, and where lesser offense evidence was precluded by law at petitioner's trial and would not have been admissible during the trial , nor could it be argued as a defense to the capital murder charge and where the evidence at trial did not negate the possibility that petitioner could have presented evidence of a lesser offense had he not been unconstitutionally precluded this option at his trial as a defense ?

B. THE constitutional provisions and statutes which this case involves, are cited as they relate to the questions as presented above ;

(1). Questions (1) through (4), as presented above, directly involves the U.S.C.A. Constitution, FOURH Amendment rights and U.S.C.A., Constitution, Fourteenth Amendment.

(2). Question (5), as presented above, directly involves the U.S.C.A., Sixth Amendment rights and U.S.C.A., Constitution, Fourteenth Amendment.

(3). Question (6), as presented above , directly involves

the U.S.C.A.,Constitution, Fourteenth Amendment ; U.S.C.A. Constitution, Eighth Amendment, U.S.C.A.,Constitution, Sixth Amendment.., The Code of Ala.,Sec.,13-11-2(1975). "The indictment ssssshall not include ang lesser offenses". And the Code of Ala.,Sec.13a-5-31(1975),"the Felony murder doctrine not to be used to supply intent."

(E),(F), and(I), A concise statement of this case containing the facts material to the consideration of the questions presented for review of this state court judgment are as written below ; with references to the afore cited and hereto,attached,opinions to ascertain the grounds ;

On August 16,1977, Rema Mae Gallins was killed by a bomb at her home,129 East North Street,Dothan,Alabama, at about 8:30 A.M..

The Dothan police dept. investigated the crime scene collecting evidence and taking statements of witnesses. The District Attorney of Dothan, Al.,Tom Sorrell , was also present at the crime scene. Detect ive Sgt.Locke and D.A., TOM SORRELL, left the crime scene going to Abbeville, AL., to arrest the petitioner where he worked, some 30 miles away from Dothan , AL., and return him to the Dothan jail. Petitioner's vehicle was searched by the bomb squad and the Dothan police while parked where petitioner left it in Dothan and rode to work with his co-workers to Abbeville, Al.. The vehicle search occurred at about 1:00 o' clock p.m., on August 16,1977 , without a warrant after petitioner's arrest. The vehicle was searched again after it was taken to the police dept. and a search warrant obtained with the aid of D.A. Tom Sorrell. Evidence seen from the first search was used to obtain the search warrant for the second search and evidence removed. The District Attorney and Sgt. Locke, then went to Hartford, Al. to obtain a warrant to search petitioner's home and remove evidence found there.

On the basis of evidence removed from petitioner's vehicle, his work clothes and the search of his home ,petitioner was convicted of capital murder. Petitioner appealed his conviction and raised the issue

of ''whether the first warrantless search of his vehicle was within the six exceptions to the warrant requirement. See App. 2., section 2 and 3 of page 213.

Secondly, petitioner attacked the sufficiency of the warrant affidavit used to search his home. Claiming that Deputy Hand had misrepresented the true source of his information supporting that warrant affidavit. See App. 2., page 213.

Thirdly, petitioner attacked the constitutionality of the Alabama Code, 1975 Death penalty statute. See App. 2, page 223.

All of the above contentions were denied on direct automatic appeal of this case by both the Alabama Criminal Court of Appeals and the Alabama Supreme Court. See App. 3, page 228.

It was during the course of petitioner's appeal to the Alabama Supreme Court that petitioner, himself, discovered from the criminal court of appeals' opinion that the information used by police supporting probable cause for his arrest, the vehicle searches and the search of his home, was clearly traversed by the testimony of the state's own witnesses at trial. Petitioner immediately submitted a pro se brief to the Alabama Supreme Court requesting a remand to the trial Court for a hearing on the issue of "intentional and reckless use of false statements by police to support probable cause." See App. 2, page 229.

(1.) After the Alabama Supreme Court affirmed the conviction, petitioner filed this Writ of Error Coram Nobis in the trial Court stating the same facts. See App. 1, at page 5. At the Writ hearing, held on Sept. 18, 1981, the trial court refused to allow petitioner the opportunity to "fully and fairly" question the affiants of these searches and present evidence on the issues. From the Writ hearing, at R-58, Capt. Stokes, the affiant officer of the first and second search of petitioner's vehicle, was being questioned concerning statements by him in support of probable cause. The following occurred:

Mr. Herring. (Q) Do you recall talking with someone concerning a post card that had been received by Mrs. Wynn the day before?
Capt. Stoke. (A) No, sir.
(Q) I will ask you to read paragraph 8. of your affidavit.
(A) (witness does as instructed).

Mr. Sorrells: Judge, we object again, on page 73, 74 and 75 of the motion to suppress, the very same questions were asked and answered at that

time. Now, we are talking about three years later and....-

THE COURT: I made it clear that we are not retrying this case again. I sustain the objection. That was litigated before.

Mr. Herring: Okay.

(2.) The Court repeatedly denied petitioner an opportunity to challenge and present proof that the affiant intentionally falsified his warrant affidavit in support of probable cause for the search of petitioner's vehicle. Paragraph 8. of the officer's affidavit is shown on page 212, of App. 2., where he states falsely that the post card message said "that this daughter would have an unhappy birthday on August 16,1977." "August 16,1977 is in fact the birthday of that daughter."

The actual message of that card did not state this daughter "Would have" an unhappy birthday on August 16,1977 ,nor was August 16,1977 , in fact the birthday of this daughter as falsely sworn to by officer Stokes in his warrant affidavit. At APP. 2., page 219 , the true message is shown as having stated the following;

"I had a great time , I wish you an unhappy birthday,"

The bomb incident occurred on the morning of August 16,1977 and officer stokes was clearly but falsely indicating that petitioner implicated the bombing would occur on the birthday of this daughter and make her unhappy. Ms. Wyms actually received the post card on her birth day which was not on August 16,1977 but on August 15,1977 ,the monday before the bombing . At the Writ hearing, Ms. Wyms was called to state her birthday for the record. At (R-38)

Mr. Herring :(Q) Do you recall...Well, before we get into that, what is your birthday ?

Ms. Wyms (A) August 15...

(Q) Okay, and when did the bombing occurrence occur ?

(A) The sirteenth..

Officer Stokes intentionally falsified his warrant affidavit in support of probable cause to search petitioner's vehicle since he had personally talked to this witness prior to ang of his searches, at the crime scene. Officer stokes stated at paragraph 8. of his warrant affidavit as shown in App. 2., page 212, that:

"Herbert Lee Richardson had within the last 6 weeks threatened to kill . Mrs Remus Callins,*******

Mrs. Remus Callins was the mother of the victim and she testified that petitioner "had never threatened her" . See App. 2., at page 222, and from the trial transcript, page 446, Vol. 3.

Mr. Herring: (Q) Did he(petitioner) ever make any threats to you ?
Mrs. Remus Callins. (A) NO, he didn't.

The warrant affidavit supporting the two searches of petitioner's vehicle are false ; by the affiant and petitioner did raise a dif - ferent issue to the search of his vehicle in this Writ of error than that raised on automatic direct appeal regarding the same vehicle sea - rch. See App. 2., page 213.

The trial court and the appellate courts of Alabama have deliberate- ly refused to apply "the preponderance of the evidence test " in determ- ining the materiality of the affiant's intentionally made false state - ments as this Court ruled in Franks V. Delaware, 57 L.ED. 2d. 667(1978).

Petitioner has no other recourse for redress of these infringeme - nts of his constitutionally protected rights in the state courts below and will lose his life if this Honorable Court does not decide this issue. The courts of Alabama intentionally discriminate against a de - fendant having a sentense of death by not affording him equal protect - ion of constitutional rights as it does a defendant with a lesser sen - tense and the same identical trial error.

(E) In Waters V. State, Ala. Cr. App. 360 So.2d. 347 , a concealing stolen property case , the appellate courts of Alabama held a warrant invalid where " officer Locke's statement in his warrant affidavit comparing a stolen typewriter to one seen by him in the defendant's home was complet- ely invalid, where officer Locke had no description of the prior stolen typewriter and where the two typewriters were later shown not to be a match as falsely claimed by officer Locke. See App. No.A., page 356 to 357.

Officer Locke is the same officer who submitted the false inform -

ation supporting probable cause for the search of petitioner's home in this case . See App. 2., page 209., paragraph 4. of the warrant affidavit where officer Locke states:

4."he personally saw pipe that was identical Pipe to that was used in the bomb, also pipe of this description was seen in the truck that Richardson used on his job."

Whether officer Locke saw identical pipe to pipe used in the bomb on petitioner's job in the truck is the material statement. Petitioner's co - worker, David Seay, testified that only pipe the size of 2½ inch was being used that day on petitioner's job. See App. 2., at page 218.

The largest size pipe found at the bomb scene was 2. inch pipe according to police reports. See App. 2., at page 216 .

Officer Locke was intentionally misrepresenting the truth in this warrant affidavit since he was at the crime scene and had himself stated the pipe was 2 inch that compose the bomb and admittedly , he talked to petitioner's co-worker, David Seay, and had learned that pipe used on petitioner's job was 2½ inch and not "identical" to a 2 inch pipe.

At App. 2. page 209, paragraph 3. of officer Locke's affidavit he swears that Randy Callins told him "he saw a bomb on his front porch." The trial transcript and Appendix 2. page 215 , Randy testifies that he never told the police he saw a "bomb" on his front porch .. (trial transcript at page 42 , vol. I.)

Mr.Herring:(Q) Did you tell them(police) you saw a bomb or a package ?
Randy Callins:(A) A package .
Mr.Herring:(Q) A package ? Okay, do you know what was in the package ?
Randy Callins:(A) NO .

Other evidence at trial reveals that the package Randy saw was not the alleged bomb as falsely misrepresented in officer Locke's warrant affidavit for the search of petitioner's home.

(4.) It follows that since officer Locke had intentionally misrepresented the truth in another warrant affidavit , some eleven months prior to his giving the information in support of the search of petitioner's home , he could not be ""a reliable person " as stated in this warrant affidavit . See App. 2., at page 209 .

""I have received information from a reliable person,***""

The facts show that officer Locke was unreliable , even as a police officer,, in giving information supporting probable cause for a search warrant when his prior history and his present history of intentionally falsifying the facts are considered together. This issue is a novice issue and should be considered by this Court since police officers are normally viewed as " reliable persons "by virtue of their jobs.

(5) The fact that the District Attorney was involved in the warrant process to a degree of relaying the information supporting the search of petitioner's home and being at the residence during the search itself ,, was enough to cast the search as being more than investigatory, since his involvement "marked the commencement of a criminal prosecution" to which the explicit guarantees of the sixth Amendment are applicable. Kirby V. Illinois, 406 U.S. 689, 92 S.ct. 1877,1882, 32 L.ED. - 2d. 411.(1967) .

This Honorable Court has never decided whether the prosecutor's complicity in the arrest ,, the preparing of warrant affidavits and the processes normally considered "police functions" ,would or would not invoke the guarantees of the sixth Amendment , as the Fifth Circuit Court of Appeals has intimated that it would .See Lomax V. State of Ala., 629 F.2d. 413(1980)

The record of petitioner's case is repleted with evidence of the prosecutorial forces of the state having focussed on petitioner during his arrest by the prosecutor,the preparing of the warrant affidavit used to search petitioner's vehicle and the warrant affidavit used to search petitioner's home. See App. I., at page 3.

(6) In this case , petitioner's death sentence was upheld on the basis that he did not present any evidence of a less serious offense at his trial and is therefore, not entitled to a new trial under this Court's holding in Beck V. State ,447 U.S. 625, 65 L.ED. 392, 100 S.ct. 2382.

Hopper V. Evans ,Number 80--1714 ,May 24,1982 , was decided by

this Court , while petitioner's writ appeal was still pending in the Alabama Criminal Court of Appeals and that holding applied to petitioner's case . The holding in Hopper V. Evans, supra, concluded that Evans' own evidence at his trial negated the possibility that he could have presented evidence of a lesser offense , since he pleaded guilty to capital murder and confessed that he killed the victim .

Your petitioner did not confess to killing the victim and did not plead guilty to capital murder . Plus, the evidence at petitioner's trial did not negate the possibility that petitioner could have presented evidence of a lesser offense had it not been for the preclusion clause barring such evidence .

It is fundamentally unfair for the state to first tell petitioner that there is no lesser included offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense . See App. I., at page IO .. Because the preclusion clause did exist prior to petitioner's trial, it limited petitioner's right to counsel in preparing for the trial itself. The preclusion clause limited trial strategy , the selection of evidence to be used , and its presentation at the trial , it limited the request for certain charges , it limited the argument of counsel at trial , it limited certain objections and it limited every aspect of the options normally available to a defendant at non-capital trials in the state of Alabama .

Unless this Honorable Court finally puts this issue to rest , the state of Alabama will apply Hopper V. Evans , supra, to all the remaining un-tried pre-Beck , supra, death penalty cases and deny petitioner and others , due process of law .

All of the issues herein raised , are of great importance and are inconsistent with this Court's prior Rulings in similar cases.

This Court's acceptance of this case, would insure consistent and equal application of the law in the state of Alabama and other states .

Petitioner, humbly, ask this Honorable Court to accept this case and decided the important issues it raises to this Court .

Most Respectfully Submitted,

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